No. 86-2043

IN THE
Supreme Court of the United States
October Term, 1986

NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL, *et al.*,

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JOHN M. CLARKE
(Counsel of Record)
GERALD M. OSCAR
THOMAS J. FARRELLY
1095 Avenue of the Americas
New York, New York 10036
(212) 395-2311
Attorneys for Petitioner
New York Telephone Company

TELFORD TAYLOR
(Counsel of Record)
435 West 116th Street
New York, New York 10027
(212) 280-2623

WALTER A. BOSSERT, JR.
DAVISON W. GRANT
One Wall Street
New York, New York 10005
(212) 344-5680
Attorneys for Petitioner
Central Hudson Gas &
Electric Corporation

August 6, 1987

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-2043

NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL, *et al.*,

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent Cahill opposes the petition for certiorari on two grounds: (1) that the decision in the state court on the state action issue is correct, and (2) that a decision in this court on review would be "premature". A number of matters raised by Respondent's Brief in Opposition require clarification.

(1) *The decision below on state action is incorrect.*

Apparently recognizing that the decisions of this Court such as *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) and *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), require that he establish state coercion, Respondent claims that the "PSC [has] developed a policy which mandates that contributions by private utilities be charged to consumers" (Resp. Br. 14). No such "mandate" exists. The decision whether to give or not to give, whom to give to, and how much to give, are decisions made by the utilities,

and are the only *cause* of the consequences of which respondent complains. This policy does not "mandate" any action by utilities. All that the state has done has been to allow certain of these expenses to be reflected in rates with the other normal, day to day, expenses incurred by utilities as part of their business operations. The fact that the utilities must submit to the Commission accountings of the contributions made is true generally of every expenditure the Petitioners make, and does not make the Commission the cause of these expenditures. Rather, it is the necessity of providing services as part of a transaction between private parties (i.e., the utility and its customers) which *causes* the expenditures. *Jackson* and *Blum* establish that mere official approval of an option initiated by a private entity does not constitute state action.

Respondent Cahill attempts to avoid the force of *Jackson* and *Blum* by pointing to the fact that it is the reversal of the Commission's charitable contributions policy "and that policy alone" (Resp. Br. 14) that is at issue. Respondent argues that it is this policy which is the source of the claimed constitutional violation. *San Francisco Arts & Athletics Inc.* v. *United States Olympic Committee.* 51 U.S.L.W. 5061 (1987), decided after the Petition herein was filed, establishes that the Respondent's reading of this Court's state action precedent is insupportable. In that case, it was claimed that the grant by Congress to the United States Olympic Committee of an exclusive right to the word "Olympic" was the source of the claimed constitutional deprivation. The Court rejected this claim noting that the grant of a right by government to a private party does not, in itself, make the private party a state actor. The exercise of such a right can be state action only if the state encouraged or coerced the private party's action. The Court noted that: "The USOC's choice of how to enforce

its exclusive right to use the word 'Olympic' simply is not a governmental decision" 55 U.S.L.W. at 5067. Similarly, here, the utilities' decisions as to charitable contributions remain with the utilities.

In support of his state action claim, Respondent points to the fact that once the Commission sets a utility's rates the utility must charge those rates. (Resp. Br. 2-3). All this means is that, unlike the prices charged by the generality of businesses, if the utilities wish to change their prices, they must be submitted to the Commission for review. *Jackson* recognized that this system of seeking and obtaining approval does not constitute state action.

Two other matters raised in Respondent's opposition require clarification.

First, Respondent claims that the Commission has "ruled that certain prospective donors do not qualify as organizations for which donations may be recaptured from ratepayers" (Resp. Br. 4) and that the Commission has, after reviewing a list of contributions, disallowed "some claimed expenses as opposed to others" (*Id.* at 12, n.2). The cited cases do not support this claim of an active Commission role in reviewing recipients of utility contributions.

Respondent first cites the Commission's 1970 decision in which, in response to evidence presented by New York Telephone, the Commission announced the reversal of its charitable contributions policy. However, in that decision the Commission disclaimed the active role alleged by Respondent. The Commission noted: "However we emphasize that it is not our function to screen lists of contributions, to pick out the good from the bad" (Petitioners' Appendix, A46-47).

Respondent also claims that in the 1984 New York Telephone rate decision, which he is now challenging, the Commission screened contributions. However, an examination

of the cited pages (reproduced in Petitioners' Appendix at A40-44), makes clear that the Commission was not determining which contributions should or should not be reflected in rates. Rather, the Commission was considering whether certain expenditures should be treated as employee related expenses, and not as charitable contributions. Unlike charitable contributions, recovery of employee related expenses are not limited by a pre-established formula. The affidavits of the Commission and New York Telephone Company reproduced in the Petitioners' Appendix (A55-56; A71-75) establish that the Commission has consistently followed the policy announced in its 1970 decision of not reviewing the merits of individual contributions.

The second matter that requires clarification is Respondent's claim that a majority of the recipients of utility contributions are "either religiously affiliated, or otherwise socially or politically oriented" (Resp. Br. 4). The record here establishes that the rates at issue, i.e., New York Telephone's rates, do not include contributions for "religious organizations when denominational or sectarian in purpose" (Pet. Appendix A75). With regard to the claim that contributions are made to "politically oriented" organizations, as this Court recognized in *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 550 (1979), utilities in New York cannot include political expenditures in rates.

(2) *Review by this Court of the state action issue would not be premature.* Contrary to Respondent's assertion, Petitioners have not argued that the present circumstances "compel an exception to the general rule against piecemeal review." (Resp. Br. 17). This Court's authority to grant or deny petitions for certiorari is, of course, plenary. We have endeavored to spell out the circumstances which establish the wisdom, if not the necessity, of proximate re-

view of the state action issue, because the outcome will, we believe, both dissipate the confusion with which New York Courts have infused the state action doctrine, and avoid a perhaps prolonged confrontation of the First Amendment issues. Respondent Cahill has made no serious effort to meet these considerations, or to deal with the decisions of this Court which bear on them.[1]

The Johnson Act, 28 U.S.C. § 1342, relied on by Respondent (Resp. Br. 17-18), has nothing to do with this case in its present posture. The Johnson Act is a carefully crafted statutory exclusion of what would otherwise be a federal district court's jurisdiction. If certain conditions are met, the Act bars suits in federal district courts which seek to "enjoin, suspend or restrain" rate orders. The Act clearly does not apply to bar the Petition herein; the Petitioners obviously are not asking a federal district court to enjoin an order of the Commission.[2]

---

[1] *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967), cited by Respondent (Resp. Br. 16), is a per curiam decision which indeed denied certiorari on the ground that the case "was not yet ripe for review", but has no bearing here, where the state court decision on the state action issue is final and is obviously "ripe for review".

[2] An article dealing with the then-recently enacted Johnson Act, discussing possible constitutional attacks on the Act as violative of Article III of the Constitution, stated:

> "Federal Judicial power and the jurisdiction of the Supreme Court are derived directly from the Constitution and, therefore, are not subject to legislative alteration. But the jurisdiction of every other federal court comes from the authority of Congress, which may restrict or expand it subject to the one limitation that it be not extended beyond the constitutional boundaries. The Johnson Bill makes no change in the extent of the power of the federal judiciary inasmuch as the United States Supreme Court will still retain appellate review of the state courts." (footnotes omitted). Comment, "Limitation of Lower Federal Court Jurisdiction Over Public Utility Rate Cases", 44 *Yale L.J.* 119, 128-29 (1934).

Conclusion

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

JOHN M. CLARKE
(Counsel of Record)
GERALD M. OSCAR
THOMAS J. FARRELLY
1095 Avenue of the Americas
New York, New York 10036
(212) 395-2311

Attorneys for Petitioner
New York Telephone Company

TELFORD TAYLOR
(Counsel of Record)
435 West 116th Street
New York, New York 10027
(212) 280-2623

WALTER A. BOSSERT, JR.
DAVISON W. GRANT
One Wall Street
New York, New York 10005
(212) 344-5680

Attorneys for Petitioner
Central Hudson Gas &
Electric Corporation

August 6, 1987